MF 02-2
Tax Type: Motor Fuel Use Tax
Issue: Dyed/Undyed Diesel Fuel (Off Road Usage)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	
	)	**Docket No. 01-ST-0000**
v.	)	**Acct # 00-00000**
ABC TOWNSHIP ROAD DIST.	)	
Taxpayer	)	

RECOMMENDATION FOR DISPOSITION

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Alan J. Novick of Jennings, Novick, Smalley & Davis, P.C. for ABC Township Road District.

Synopsis:

The Department of Revenue ("Department") issued three Notices of Penalty for Motor Fuel Tax ("Notices") to ABC Township Road District ("taxpayer"). The Notices alleged that the taxpayer failed to display a notice on its storage facility for dyed diesel fuel and that the taxpayer operated a licensed motor vehicle with dyed diesel fuel in its tank. The taxpayer timely protested the Notices, and an evidentiary hearing was held. After reviewing the record, it is recommended that this matter be resolved partially in favor of the taxpayer and partially in favor of the Department.

FINDINGS OF FACT:

1. On February 22, 2001, the taxpayer failed to display the notice "Dyed Diesel Fuel, Non-taxable Use Only" on its storage tank that is used to store or distribute dyed diesel fuel. (Dept. Ex. #2)

2. On March 30, 2001 the Department issued a Notice of Penalty for Motor Fuel Tax to the taxpayer showing a penalty due of $500 for the failure to display the required notice on its storage tank on February 22, 2001. The Notice was admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1).

3. On February 22, 2001, a Special Agent of the Department inspected the fuel in the tanks of two different trucks, license numbers XXXXXX and XXXXXX, owned by the taxpayer. The trucks were parked at the taxpayer's premises. The Special Agent found that the fuel in the tanks of both trucks was dyed diesel fuel. (Dept. Ex. #2)

4. On March 30, 2001, the Department issued to the taxpayer two Notices of Penalty for Motor Fuel Tax for operating a licensed motor vehicle with dyed diesel fuel in its tank on February 22, 2001. The first Notice showed a penalty due of $2,500 and the second Notice showed a penalty due of $5,000 because it was a "second or subsequent occurrence." The Notices were admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1)

CONCLUSIONS OF LAW:

Section 21 of the Motor Fuel Tax Act ("Act") (35 ILCS 505/1 *et seq.*) incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department's determination of the amount owed is *prima facie* correct and *prima facie*

evidence of the correctness of the amount due. 35 ILCS 505/21; 120/5. Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to prove by sufficient documentary evidence that the assessment is incorrect. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill.App.3d 1036, 1039 (2nd Dist. 1978).

Section 4f of the Act, which became effective January 1, 2000, provides as follows:

> A legible and conspicuous notice stating "Dyed Diesel Fuel, Non-taxable Use Only, Penalty for Taxable Use" must appear on all containers, storage tanks, or facilities used to store or distribute dyed diesel fuel. (35 ILCS 505/4f)

Subsection 14 of Section 15 of the Act provides as follows:

> 14. Any person who owns, operates, or controls any container, storage tank, or facility used to store or distribute dyed diesel fuel without the notice required by Section 4f shall pay the following penalty:
>
> First occurrence……$ 500
>
> Second and each occurrence thereafter……..$1,000 (35 ILCS 505/15).

Paragraph 15 of Section 15 of the Act, provides in part as follows:

> 15. If a licensed motor vehicle is found to have dyed diesel fuel within the ordinary fuel tanks attached to the motor vehicle, the operator shall pay the following penalty:
>
> First occurrence……..……..……$2,500
>
> Second and each occurrence thereafter……..……..……$5,000 (35 ILCS 505/15).

The Department's *prima facie* case was established when the Department's certified copies of the Notices were admitted into evidence. In response, the taxpayer presented invoices from its supplier from March 1999 through July 2001. The invoices show that the taxpayer regularly purchased low sulfur diesel fuel from its supplier and paid state sales tax on the purchases. (Taxpayer Ex. #1-6) The taxpayer alleges that its supplier was not remitting the tax to the Department. The taxpayer contends that its supplier is the "bad guy," and the Department should be focusing its attention on the supplier and not the taxpayer. The taxpayer further states

that the taxpayer received conflicting information from the Department concerning the use of dyed diesel fuel. The taxpayer also argues that the $5,000 penalty should be dismissed because the dyed fuel was found in the trucks at the same time and not on successive days. The taxpayer's final arguments are that the penalties should be dismissed based on the constitutional principles of intergovernmental immunity and vagueness.

The taxpayer's allegations concerning its supplier are not relevant to the issues in this case. The relevant inquiry is whether the taxpayer had the proper notice on its storage tank and whether the taxpayer had dyed diesel fuel in the tanks of its licensed motor vehicles. Whether or not the supplier collected and paid sales tax on the sales is not pertinent to this inquiry. The taxpayer did not present any evidence concerning the notice on the storage tank, and the taxpayer's highway commissioner stated that he was aware that the trucks had dyed diesel fuel in the tanks. (Tr. p. 11) The commissioner stated that he uses the fuel from the storage tank in his trucks and his road grater, backhoe, and end-loader (Tr. p. 13).

Although the taxpayer claims that it received conflicting information from the Department concerning the use of dyed diesel fuel, the taxpayer, through its commissioner, admitted at the hearing that some of the information that caused confusion was received from the taxpayer's supplier, not the Department. (Tr. p. 17; Taxpayer Ex. #8) The Department is required to abate taxes and penalties only if they are based on erroneous written information or advice from the Department. (20 ILCS 2520/4) The written information that the taxpayer received from the Department, Information Bulletin FY 2000-3, indicates that dyed diesel fuel must be used for nonhighway purposes. (Taxpayer Ex. #9) The information bulletin also states that the dyed diesel fuel storage tank must be labeled with the notice "Dyed Diesel Fuel, Non-

Taxable Use Only." Nothing in the record indicates that the taxpayer received erroneous written information from the Department.

The constitutional arguments raised by the taxpayer are also without merit. The taxpayer argues that under the doctrine of intergovernmental immunity, the State of Illinois should not be allowed to tax another unit of local government. The doctrine of intergovernmental immunity, however, is based on the Supremacy Clause and bars the States from directly taxing federal property and federal obligations. See Rockford Life Insurance Company v. Illinois Department of Revenue, 482 U.S. 182, 190, 107 S.Ct. 2312, 2317 (1987). The doctrine does not apply in the present case because the penalties are not assessed against the federal government. Nothing prohibits the Department from assessing penalties in this case against a unit of local government.

The taxpayer also argues that the statute is unconstitutionally vague because a person of ordinary intelligence cannot understand it. A reading of the statute, however, reveals that it is not vague at all. The statute clearly indicates what conduct subjects a party to liability, and nothing in the statute allows for arbitrary or discriminatory enforcement of the penalties.

The taxpayer's final argument concerns the $5,000 penalty and raises a valid concern. Paragraph 15 of Section 15 of the Act provides that if a licensed motor vehicle is found to have dyed diesel fuel in its fuel tanks, the operator shall pay a $2500 penalty for the first occurrence and a $5000 penalty for the second and each occurrence thereafter. The term "occurrence" is defined as "something that takes place; incident." (American Heritage Dictionary, Second College Edition, 1982, p. 860). The incident that took place in this case was the inspection of the taxpayer's premises. Although the Special Agent found dyed fuel in the tanks of two different trucks on February 22, 2001, only one occurrence took place. The $5000 penalty should therefore be dismissed.

Recommendation:

For the forgoing reasons, it is recommended that the $500 penalty for the failure to display the notice and the $2500 penalty for the first occurrence of dyed diesel fuel in the tanks be upheld. It is also recommended that the $5000 penalty be dismissed.

_____

Linda Olivero
Administrative Law Judge

Enter: March 11, 2002